UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SOLOMON MULUGETA,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.
_____/

No. C-01-0332 EDL

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this employment discrimination case between plaintiff Solomon Mulugeta ("Mulugeta") and defendant The Regents of the University of California ("Regents"), two motions for summary judgment are currently before the Court. The Regents have moved for summary judgment on all claims. Mulugeta has moved for partial summary judgment on his claim for a writ of administrative mandamus. For the reasons set forth below, the Court denies Mulugeta's motion, and grants in part and denies in part the Regents' motion.

I. Background

Mulugeta was born in Ethiopia in 1958. (Wollert Decl., Ex. A, Mulugeta Dep. 9:21-24.) In 1983, he was hired as a parking assistant at the University of California at San Francisco ("UCSF"). (Id. 16:23-17:3.) In 1984, he became a vehicle maintenance assistant in the UCSF Transportation Department. (Id. 17:17-23.) From 1989 until he left the employment of USCF in 1998, he was a maintenance coordinator or assistant coordinator. (Id. 24:11-25:14.)

Except for the year 1996, Peter Davis was Mulugeta's supervisor in the Transportation Department at all relevant times. (Id. 26:1-16.) In 1996, Mulugeta's supervisor was Jon Gledhill. (Id. 26:17-20.) The Transportation Department is overseen by Vice Chancellor-Administration

Stephen Barclay. (Wollert Decl., Ex. B, Gledhill Dep. 65:2-19; Plaintiff's Ex. 12.)

In March, 1998, Mulugeta was hired as a real estate analyst in the Real Estate Department. (Request for Judicial Notice, Ex. A, Reporter's Transcript of Proceedings Held Before Franklin Silver, Hearing Officer, July 22, 1999 ("Grievance Hearing Tr.") 273:23-274:6.) The Real Estate Department is overseen by Vice Chancellor for University Advancement and Planning Bruce Spaulding. (Wollert Decl., Ex. C., Spaulding Dep. 13:2-21.)

In the mid-1990's, the Regents gave Mulugeta the opportunity to take classes at the Building Owners and Managers Institute ("BOMI"), at the Regents' expense. Barclay authorized his executive assistant, Claudette Johnson, to issue a check in BOMI's name to pay for Mulugeta's tuition. (Grievance Hearing Tr. 434:5-435:14.) Johnson gave Mulugeta the check, so that he could take it to his class. (Id. 435:436:2.) Mulugeta acknowledged that the check was made out to BOMI, in the amount of $1,965. (Id. 495:13-21.) The check was to pay Mulugeta's tuition for three classes and a seminar. (Id. 496:10-19.)

After Mulugeta received the check, he called Michael Clevenger at BOMI to ask whether he could take the classes in different cities in order to finish them more quickly. (Id. 496:25-500:14.) Clevenger told Mulugeta that he could take the classes in different cities, and that he would help arrange it. (Id.) Clevenger also told Mulugeta not to pay the San Francisco Building Owner Management Association ("BOMA"), where Mulugeta had taken an earlier class, until Clevenger gave him further instructions. (Id.) The reason Clevenger told him not to pay was that Clevenger was having difficulties getting tuition payments transferred between different BOMI offices. (Id. 126:4-127:14.) Clevenger told Mulugeta not to pay until Mulugeta finished his internship in the fall of 1998, which was two or three years away. (Id. 127:15-128:24; 168:20-170:18.)

Mulugeta then endorsed BOMI's name on the check, endorsed his own name, and deposited a portion of the check into his personal account, keeping $100, for a total deposit of $1,865. (Mulugeta Dep. 113:13-116:6.) Mulugeta admitted at deposition that no one told him to deposit the check in his personal account. (Id. 118:1-25.) At deposition, Mulugeta testified that he withdrew $100 to purchase a textbook for the class. (Id. 116:4-19.) He did not have to purchase a textbook for any prior BOMI class. (Id. 116:17-19.) He also testified that he deposited the money because he

needed to travel to Chicago. (Id. 116:20-117:1.) Although the testimony is not clear, it appears that Clevenger told the grievance hearing officer that Mulugeta did attend a BOMI class in Chicago in the fall of 1996 prepared to pay tuition in cash, but Clevenger did not want to accept the tuition payment in cash. (Grievance Hearing Tr. 174:11-175:10.)

Mulugeta later received one or two invoices from BOMI, but Clevenger told him not to pay them. (Id. 124:20-125:13.) Gledhill testified at deposition that Mulugeta brought those invoices to him in early 1998, and asked him for assistance. (Gledhill Dep. 94:19-95:4.) Gledhill faxed the invoices to Susan Montrose at Chancellor Joe Martin's office and asked her to look into them. (Id. 95:5-96:8.) By spring or summer of 1998, the invoices had been forwarded to Johnson, the executive assistant to Vice Chancellor Barclay. (Grievance Hearing Tr. 436:3-437:2.)

Johnson discovered that the check she had issued had been cashed, but that BOMI had not received payment. (Id. 437:19-22.) Johnson then called Mulugeta, and asked him if he had paid for the classes. (Id. 438:2-11.) Mulugeta told her that his professor had told him not to pay the tuition until after he completed his internship. (Id. 438:10-22.) Johnson reported the information to Barclay, who then asked Bob Obana to do fact-finding about the situation. (Id. 439:9-20.)

After Johnson called him, Mulugeta called Clevenger. (Id. 522:20-523:4.) Clevenger told him to send a money order right away to BOMI, so Mulugeta sent BOMI a money order for $1,820, which was the actual amount of tuition he owed. (Id. 523:2-525:12.) He also prepared a check to UCSF for $155, which was the difference between the $1,965 check USCF issued to Mulugeta and the $1,810 in tuition he owed BOMI. (Id. 525:13-526:13.) He tried to give the check to Johnson, but she would not accept it, so Mulugeta gave the $155 check to Obana when Obana interviewed him several weeks later. (Id. 526:14-528:19; 221:23-222:25.)

Mulugeta told Obana that he had deposited the entire original $1,965 check into his personal bank account. (Id. 223:13-224:1.) He told Obana that he withdrew the entire amount of that bank account the same week to pay BOMI in cash. (Id. 225:4-6.) At Mulugeta's second meeting with Obana, he brought his banking statements, and Obana asked him why there was no deposit for $1,965. (Id. 228:14-230:5.) Mulugeta said he did not know, but confirmed again that he had deposited the entire amount of the check, and withdrew that same amount later that week in cash to

pay BOMI. (Id.) Mulugeta's bank statements showed that he had deposited $1,865 on September 16, 1996, and withdrew $950 on January 6, 1997. (Id. 228:14-231:22; 22:11-23:17.) Mulugeta could not explain the discrepancies between what his banking statements showed and what he recalled doing. (Id. 232:1-4.)

After Obana completed his initial review, he turned over the information he obtained to Kenton LeFore, who was then Associate Director for the Audit Management Services Department. (Id. 18:20-19:20:9.) Barclay had asked LeFore to perform an audit of Mulugeta. (Id.) LeFore extracted data from the general ledger on any payments to Mulugeta during the past five years. (Id. 20:2-14.) LeFore's final report concluded that in addition to depositing the $1,965 BOMI check in his account, Mulugeta had also been overpaid by $108 for a travel voucher relating to another course in May 1996. (LeFore Decl., Ex. A at 6.) The report found that Mulugeta had reported $541 in hotel expenses on that travel voucher, but only incurred hotel expenses of $433. (Id.)

LeFore presented his audit report in a meeting with Irene Agnos, Esther Morales, and Linda Glasscock. (Agnos Dep. 63:1-6.) Irene Agnos is Assistant Vice Chancellor for University Relations; her job duties include overseeing the Real Estate Department. (Agnos Dep. 22:16-21.) She reports directly to Spaulding. (Id. 23:8-17.) She has had the authority to discipline employees since 1995 or 1996. (Id. 28:20-29:22.) Agnos made the decision to terminate Mulugeta, after consulting with Glasscock and Morales. (Id. 69:6-8, 69:23-70:6.) She did not discuss the matter with Barclay. (Id. 69:9-20.) At one point in her deposition, she testified that she could not recall whether she discussed the matter with Spaulding before she terminated Mulugeta. (Id. 69:9-16.) Later in her deposition, she testified that she advised Spaulding that she intended to terminate Mulugeta before she sent the termination letter to Mulugeta, but she did not consult with him. (Id. Dep. 81:12-83:1.) Agnos felt that termination was appropriate because Mulugeta had endorsed a check that was made payable to BOMI and deposited it in his own account, and then submitted the BOMI invoices to the university for payment. (Grievance Hearing Tr. 183:19-184:17.) Agnos also was concerned that Mulugeta was working in the Real Estate Department where checks were regularly received by the university. (Id.)

In 1998, Glasscock was Manager of Employee Relations. (Glasscock Dep. 22:19-24.)

Glasscock felt that termination of Mulugeta's employment was appropriate because his job in the Real

Estate Department potentially involved handling cash and checks. (Id. 118:6-121:22.)

In 1998, Morales was Director of Real Estate Services. (Grievance Hearing Tr. 272:23-273:3.) She had hired Mulugeta only a few months earlier, on Agnos' recommendation. (Id. 282:25-284:10.) Morales recommended that Mulugeta be terminated. (Id. 277:20-278:9.) Morales was concerned that the Real Estate office receives a lot of property tax checks and other checks, and occasionally the "small mom-and-pop-style landlords" with whom the office has relationships "sometimes make checks out to the individual persons in the office rather than the Regents by mistake." (Id. 279:13-280:11.) Her concern that those checks could be easily misappropriated played a key role in coming to her recommendation that Mulugeta should be terminated. (Id. 279:24-280:22.)

On August 14, 1998, Agnos sent Mulugeta a letter informing him that his employment was being terminated for misuse of university resources. (Wollert Decl., Ex. F.)

Mulugeta filed a grievance based on his termination, and a formal grievance hearing was held on July 22, September 27, and October 1, 1999. Mulugeta's attorney stated the issues as follows:

> First, did the appellant engage in any conduct that supports the charge of misuse of University resources, thus justifying the imposition of any disciplinary action by USCF.
>
> Second, if it is found that appellant did engage in some conduct supporting the charge of misuse of University resources, thus justifying the imposition of disciplinary action, should a lesser penalty than termination be imposed.
>
> Third, is USCF subjecting appellant to discriminatory application of discipline by terminating him for his alleged misuse of University resources.

(Grievance Hearing Tr. 9:14-10:1.)

On January 12, 2000, the grievance hearing officer issued written "Findings and Decision," in which he concluded that Mulugeta:

> misused University resources by depositing the BOMI check in his personal account and retaining it for a year and a half, and by taking a past due BOMI invoice to his supervisor and requesting assistance in taking care of the invoice. These findings represent dishonesty of the sort which goes to the heart of the employment relationship, rather than simple negligence or mistake of judgment. Accordingly, the University reasonably concluded that [Mulugeta] should be dismissed, notwithstanding his lengthy and satisfactory prior employment.

(Request for Judicial Notice, Ex. B at 28.)

Mulugeta filed suit against the Regents in the Superior Court for the City and County of San

Francisco, alleging claims for discrimination on the basis of race and national origin in violation of the California Fair Employment and Housing Act ("FEHA"); retaliation in violation of California Government Code § 8547.10 for his prior testimony against another co-employee for misuse and theft of public property; intentional infliction of emotional distress; and wrongful termination in violation of public policy.

On October 20, 2000, Mulugeta filed a second action against the Regents, alleging a claim for race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, and also seeking a writ of administrative mandamus to overturn the January 12, 2000 decision of the grievance hearing officer.

On January 18, 2001, the parties stipulated to consolidate the two actions. The Regents removed the newly consolidated action to this Court the following day.

Defendants now move for summary judgment on all claims. Mulugeta has filed a motion for partial summary judgment on his claim for a writ of administrative mandamus.

II. Discussion

A. Summary judgment standard

Rule 56©) of the Federal Rule of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. See id. The court may not weigh the evidence. See id. at 255. Rather, the nonmoving party's evidence must be believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing Liberty Lobby, 477 U.S. at 255).

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court that there is an

absence of evidence to support the nonmoving party's case. See id. at 325. Where the moving party "bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial." Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (citations omitted); see also Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986) (when plaintiff moves for summary judgment on an issue upon which he bears the burden of proof, "he must establish beyond peradventure all of the essential elements of the claim . . . to warrant judgment in his favor.").

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Liberty Lobby, 477 U.S. at 250. The opposing party, however, need not produce evidence in a form that would be admissible at trial in order to avoid a summary judgment. See Celotex, 477 U.S. at 324. Nor must the opposing party show that the issue will be resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is necessary is sufficient evidence supporting the asserted factual dispute and requiring a jury or judge to resolve the parties' differing versions of the truth at trial. See id.

B. Petition for writ of administrative mandamus

The Court will begin with the cross-motions for summary judgment on Mulugeta's claim for a writ of administrative mandamus. "[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." Johnson v. City of Loma Linda, 24 Cal. 4th 61, 69-70, 99 Cal. Rptr. 2d 316, 322 (2000). The Regents exercise adjudicatory powers derived directly from the California Constitution. Mendoza v. Regents of the University of California, 78 Cal. App. 3d 168, 176, 144 Cal. Rptr. 117, 122 (1978). When the Regents terminate an employee as a result of

a post-termination grievance hearing, the employee may obtain review of that decision through a petition for a writ of administrative mandamus, pursuant to section 1094.5 of the California Code of Civil Procedure. Id.

1. On the current record, the Regents have not shown that Mulugeta's petition was untimely

The Regents argue that Mulugeta's claim for a writ of administrative mandamus is untimely. Mulugeta argues in response that the 90-day time limit set forth in section 1094.6 of the California Code of Civil Procedure never began to run because he was never given proper notice of the time within which review must be sought.

As the Regents' counsel pointed out at oral argument, although unfortunately not in their briefing, the time limits in section 1094.6 do not apply to the Regents. Section 1094.6 applies only to "[j]udicial review of any decision of a local agency, other than school district, as the term local agency is defined in Section 54951 of the Government Code, or of any commission, board, officer or agent thereof[.]" Cal. Code Civ. Proc. § 1094.6(a). Section 54951 of the California Government Code defines "local agency" as "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency." Notably missing from that definition is any state government entity.

Section 54951 is part of the Brown Act, which generally requires local governmental entities to conduct its meetings in public. See Cal. Gov. Code §§ 54950.5, 54953. A separate law, the Bagley-Keene Open Meeting Act, imposes open meeting requirements on state governmental bodies, including the Regents. See Cal. Gov. Code §§ 11120 et seq.; Regents of the University of California v. Superior Court, 20 Cal. 4th 509, 520 and n.5, 532, 85 Cal. Rptr. 2d 257, 263 and n.5, 271 (1999). By limiting the application of section 1094.6 of the California Code of Civil Procedure to local agencies as defined in the Brown Act, the legislature intended to exclude state bodies such as the Regents from the scope of section 1094.6. Accordingly, the Court rejects Mulugeta's argument that the time for filing a petition for a writ of administrative mandamus never began to run because the Regents did not provide the notice required by section 1094.6.

As the time limit set forth in section 1094.6 does not apply, the Court must determine what time limit does apply. Section 1094.5 contains no statute of limitations, and neither the parties nor the Court have located any cases or statutes which establish a limitations period for filing a petition for a writ of administrative mandamus against a state governmental entity, such as the Regents.

The Regents argue that Mulugeta was required to file his petition for a writ of administrative mandamus within 60 days. The Regents rely upon two cases, Planned Parenthood Golden Gate v. Superior

Court, 83 Cal. App. 4th 347, 99 Cal. Rptr. 2d 627 (2000) and Wagner v. Superior Court, 12 Cal. App. 4th 1314, 16 Cal. Rptr. 2d 534 (1993). In Planned Parenthood, the court noted that "[w]here there is otherwise no statutory authority or time limit in filing a writ, it must usually be filed within 60 days." Planned Parenthood, 83 Cal. App. 4th at 356, 99 Cal. Rptr. 2d at 635.

The court nonetheless chose to exercise its discretion to hearing the petition for a writ of mandate beyond the 60-day period, because important rights of third parties were at stake, unlike here. Id. at 356, 99 Cal. Rptr. 2d at 636. In Wagner, the court held that "[t]here is no absolute deadline for filing a petition for writ of mandamus, although the equitable doctrine of laches may bar relief when the petitioner has unreasonably delayed in filing the petition to the prejudice of the opposing party." Wagner, 12 Cal. App. 4th at 1317, 16 Cal. Rptr. 2d at 536. The court found no unreasonable delay because the plaintiff had only waited four months to file its petition. Id. In any case, neither decision is really on point, as they address the time limit for filing a petition for a writ of mandate, presumably pursuant to section 1085 of the California Code of Civil Procedure, not the time limit for filing a petition for a writ of administrative mandamus pursuant to section 1094.5.

In Johnson v. City of Loma Linda, 24 Cal. 4th 61, 99 Cal. Rptr. 2d 316 (2000), the California Supreme Court addressed the timeliness of a petition for a writ of administrative mandamus brought pursuant to section 1094.5. Although in that case, the petition was brought against a local agency, the 90-day time limit in section 1094.6 did not apply because the city did not provide the plaintiff with the requisite notice. Id. at 68, 99 Cal. Rptr. 2d at 321. Rather than turning to another statute of limitations, the Court analyzed the timeliness of the petition under the doctrine of laches. Id. "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." Id. (quoting Conti v. Board of Civil Service Commissioners, 1 Cal. 3d 351, 359, 82 Cal. Rptr. 337 (1969)). "[T]he period of delay to be considered includes the time both before and after the filing of the petition for administrative mandate." Id. "Review of a personnel decision of a public agency must be sought promptly." Id.

In Johnson, the plaintiff waited more than 18 months before filing his petition for writ of administrative mandamus. Id. The Court found that he also failed to pursue his petition for more than 18 months after it was filed, because he did not seek an expedited hearing from the court. Id. The

Court rejected the plaintiff's argument that local court calendar conditions caused the court's delay in hearing the petition. "These delays in the trial court do not, however, justify plaintiff's failure to pursue judicial resolution of his petition for writ of administrative mandate by asking the court to set the matter for a hearing." Id. at 68-69, 99 Cal. Rptr. 2d at 322. The Court found the three year delay from the time the administrative decision was issued until the court held a hearing on the petition was unreasonable. Id. at 68, 99 Cal. Rptr. 2d at 322.

Here, Mulugeta's initial delay in filing his petition was significant, albeit somewhat less than the delay in Johnson. The grievance hearing officer's Findings and Decision was issued on January 12, 2000. Mulugeta did not seek a writ of administrative mandamus until October 20, 2000, approximately ten months later. As in Johnson, moreover, Mulugeta made no effort to expedite a hearing on his petition for a writ of administrative mandamus. For example, he could have asked the Court at the initial case management conference to set an immediate briefing schedule on his petition for a writ of administrative mandamus, but his case management statement did not even mention that cause of action. It is now more than two-and-a-half years since the grievance hearing officer's decision was issued. If the three year delay in Johnson was unreasonable, the two-and-a-half-year delay here is similarly unreasonable.

Unreasonable delay alone, however, is not enough to support a finding of laches. "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." Id. at 68, 99 Cal. Rptr. 2d at 321 (quoting Conti v. Board of Civil Service Commissioners, 1 Cal. 3d 351, 359, 82 Cal. Rptr. 337 (1969)). Mulugeta did not acquiesce in his termination. Rather, he filed a state court action

challenging his termination, and later filed his petition for a writ of administrative mandamus.

"A discharged employee's unreasonable delay in seeking judicial review of the discharge may prejudice the employer either 'because reinstatement would require discharge of a substitute employee or because the employing agency might be compelled to incur a double payment consisting of back pay to the discharged employee and salary to his replacement.'" Id. at 69, 99 Cal. Rptr. at 322 (quoting Conti, 1 Cal. 3d at 360.) The Johnson Court found that the defendant had suffered such prejudice because of the plaintiff's unreasonable delay, and concluded that the doctrine of laches barred plaintiff's petition for writ of mandamus. Id. So far, the Regents have not made any attempt to show that

they have suffered prejudice resulting from Mulugeta's delay in bringing and litigating his petition for a writ of administrative mandamus.

Other than the Regents' failure to present any absence of evidence of prejudice, however, this case is nearly identical to Johnson on the issue of laches. Accordingly, although at this time the Regents have not shown that they are entitled to summary judgment on Mulugeta's petition for a writ of administrative mandamus on the ground that it is untimely, if defendant believes it can establish prejudice, the Court will permit further briefing and evidence as to such prejudice under the doctrine of laches.

2. Mulugeta has not shown that he is entitled to summary judgment on his petition for a writ of administrative mandamus

A petition for a writ of administrative mandamus is heard by the court sitting without a jury. Cal. Code Civ. Proc. § 1094.5(a).

> The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

Cal. Code Civ. Proc. § 1094.5(b).

Mulugeta moves for summary judgment on his petition for a writ of administrative mandamus on several grounds. First, Mulugeta argues that the Regents failed to follow their own procedures and thus abused their discretion or acted outside their jurisdiction. Second, he argues that

he did not misuse university resources because the check he cashed was BOMI's funds, not the funds of the Regents. Third, he argues that the grievance hearing was unfair because the hearing officer was appointed from a list provided by the university.

a. Mulugeta has not shown that the university abused its discretion by failing to follow its own procedures for investigating Mulugeta's alleged misuse of university resources

Mulugeta contends that the Regents did not follow their normal procedures for investigating misuse of university resources. The essence of his complaint is that the investigation and subsequent discipline was performed by persons other than the persons who should have performed those duties under the "UCSF

Procedures for Investigating Misuse of University Resources" ("Misuse Procedures"). (Tsadik Decl., Ex. 7.) In particular, he complains that under those procedures, the Vice Chancellor-Administration, the Assistant Vice Chancellor-Administration, and the Director of Audit and Management Services have the responsibility for conducting investigations into misuse of university resources and developing a corrective action plan. Mulugeta contends that those persons were not involved in his investigation.

The Regents object to Mulugeta's Exhibit 7 (the Misuse Procedures) on the ground that it has not been properly authenticated. Mulugeta's attorney, Tesfaye Tsadik, authenticated the document by attesting that "Exhibit 7, is a true copy of the regulation that was produced by Defendant in the initial disclosure of this case." (Tsadik Decl. ¶ 5.) "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Ev. 901(a). "[U]nauthenticated documents cannot be considered in a motion for summary judgment." Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). The Regents acknowledged at the hearing that they produced the document to Mulugeta in discovery. Thus, the Court has no difficulty concluding that Exhibit 7 is an authentic Regents document. See Orr, 285 F.3d at 777 and n.20.

The fact that the document was produced in discovery by the Regents, however, does not show that the procedures set forth in the document were ever adopted, that they were in effect at the time the investigation of Mulugeta took place, or that those procedures were intended to create an iron-clad set of regulations for conducting that investigation. Mulugeta presents no evidence at all on these issues. Accordingly, the Court finds that Exhibit 7 lacks foundation. Mulugeta has not submitted sufficient evidence to show that the policies set forth in Exhibit 7 were in effect at the time of the investigation that ultimately led to his termination, much less how these at best ambiguous procedures were interpreted and applied. Indeed, the Regents have submitted evidence that the procedures do not apply in the manner Mulugeta contends. (Glasscock Decl. ¶¶ 3-5.) Although Mulugeta objects to this declaration on the ground that it contradicts Glasscock's deposition testimony, he fails to point to any specific contradiction. Accordingly, his objection is overruled. Without Exhibit 7, Mulugeta's entire argument on this point fails.

In addition, neither the parties nor the Court have located any cases in which alleged improprieties in a pre-hearing investigation were considered to be a basis for issuing a writ of administrative mandamus.

The writ provides a mechanism for overturning the outcome of a hearing. Cal. Code Civ. Proc. § 1094.5(a). Thus, the focus of the Court necessarily is on the content and conduct of the hearing. Whether different people conducted the investigation than the Regents' procedures may contemplate seems entirely beside the point, unless it caused some unfairness or prejudice to Mulugeta in the hearing. Mulugeta does not contend that the way his investigation was conducted created any prejudice to him at the hearing, nor does he contend that the grievance hearing itself was not conducted in accordance with normal procedure. Civil Service Ass'n v. San Francisco Redevelopment Agency, 166 Cal. App. 3d 1222, 213 Cal. Rptr. 1 (1985) is not on point, because there the agency disregarded its own policies on the procedures for appealing termination, which is not an issue here. For this reason also, Mulugeta's claim that a writ of administrative mandamus should be issued because of alleged irregularities during the investigation is denied.

b. Mulugeta has not shown that it was an abuse of discretion for the hearing officer to find that he deposited university funds

Mulugeta also argues that it was an abuse of discretion to find that he misused university resources because the check he deposited consisted of BOMI's funds, not university funds. This argument is frivolous. It is undisputed that Mulugeta was given university funds in the form of a check for $1,965 to pay for his BOMI tuition, and that the check was not given to BOMI, but was

instead falsely endorsed by Mulugeta and deposited into his personal account. Neither the university nor BOMI authorized Mulugeta to deposit the check into his account. There was no abuse of discretion for the grievance hearing officer to conclude that when Mulugeta deposited the university's funds into his personal bank account, instead of giving them to BOMI or returning them to the university, he was misusing university funds. Mulugeta cites no authority to the contrary.

c. Mulugeta has not shown that the process used for selecting the grievance hearing officer resulted in an unfair hearing

Mulugeta complains that the process used to select the grievance hearing officer created an unfair hearing. The only evidence submitted by Mulugeta are two letters from Lawrence Hanson, UCSF Labor Relations Advocate. (Tsadik Decl., Ex. 6.) The first letter informs Mulugeta's attorney that because of a dispute between the American Arbitration Association ("AAA") and UCSF, he is unable to obtain a list of

potential hearing officers from the AAA, and asks for his thoughts as to how the hearing officer should be selected. (Id. at 1.) The second letter suggests six names of potential hearing officers. (Id. at 2.) One of the persons on that list, Franklin Silver, did conduct the grievance hearing.

The Regents have submitted the declaration of Julius Katz, who is the "Labor and Employee Relations Coordinator at the HR-client Services Center" at UCSF. (Katz Decl. ¶ 1.) Katz attests that hearing officers are selected from a pool of approximately 11 designated arbitrators, subject to the approval of the complainant. (Id. ¶ 3.) Arbitrators are selected from the list based on availability. (Id. ¶ 4.) The person selecting the hearing officer contacts each arbitrator on the list, in order, until they locate an arbitrator who was available to handle the hearing. (Id. ¶ 5.) Katz does not attest that this procedure was used to select the hearing officer in Mulugeta's case. At oral argument, however, the parties agreed that this procedure was used, and that Mulugeta approved the hearing officer.

Mulugeta's argument appears to be that the Regents' use of a regular pool of regular arbitrators creates an inherent bias in favor of the Regents because the arbitrators are likely to rule in the Regents' favor in order to assure their continued employment. The Katz declaration directly rebuts this assumption by attesting that "UCSF does not remove arbitrators from the 'pool,' or decline to use certain arbitrators if they render decisions contrary to UCSF's interests." (Katz Decl. ¶ 4.) Mulugeta submits no evidence to the contrary.

Mulugeta relies entirely on the recent California Supreme Court case of Haas v. County of San Bernardino, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341 (2002). In Haas, the owner of a massage clinic appealed the County's revocation of his license. Id. at 1021, 119 Cal. Rptr. 2d at 343-44. The County hired an ad hoc hearing officer to conduct the hearing, over the plaintiff's objection. Id. at 1021, 119 Cal. Rptr. 2d at 344. The plaintiff objected that since the County paid the hearing officer and offered her the possibility of future work, the hearing officer had an impermissible financial interest in the case. Id. at 1021-24, 119 Cal. Rptr. 2d at 344-46. The Supreme Court agreed with the plaintiff that "a temporary administrating hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will." Id. at 1024, 119 Cal. Rptr. 2d at 346 (emphasis added).

"When due process requires a hearing, the adjudicator must be impartial." Id. at 1025, 119 Cal. Rptr. 2d at 347. "Of all the types of pecuniary interest that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny." Id. "The paradigmatic examples of adjudicators with pecuniary interests in the outcome are (1) adjudicators serving, in effect, as judges of their own cases, and (2) judges whose compensation depends on the result of adjudication." Id. at 1027, 119 Cal. Rptr. 2d at 349. The Court emphasized that the constitutional problem did not derive from the government's payment or selection of the hearing officer, but from the possibility that the hearing officer's future employment would depend on whether the hearing officer ruled in favor of the government. Id. at 1031-32, 119 Cal. Rptr. 2d at 352-53. To satisfy due process, the government need only choose hearing officers "in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to" the government. Id. at 1037, 119 Cal. Rptr. 2d at 357. The Court found that one way to do so would be to "appoint a panel of attorneys to hear cases under a preestablished system of rotation." Id. at 1037 n.22, 119 Cal. Rptr. 2d at 357 n.22.

It was undisputed at oral argument that the Regents used the system set forth in the Katz Declaration to choose the hearing officer for Mulugeta's grievance, which uses a preestablished system of rotation. Moreover, the Regents have submitted the undisputed declaration of Julius Katz attesting that "USCF does not remove arbitrators from the 'pool,' or decline to use certain arbitrators if they render decisions contrary to UCSF's interests." (Katz Decl. ¶ 4.) Mulugeta has presented no evidence to the contrary. Further, Mulugeta conceded at oral argument that, in contrast to the unilateral selection in Haas, he approved the hearing officer that was ultimately selected. Accordingly, Mulugeta has not shown that UCSF's method of choosing grievance hearing officers made his hearing unfair, and his motion for summary judgment on this issue is denied.

3. Conclusion

For the reasons set forth above, both parties' motions for summary judgment on Mulugeta's petition for a writ of administrative mandamus are denied. At oral argument, the parties agreed that this claim could be resolved on further summary judgment motions. Accordingly, the parties will file simultaneous cross-motions for summary judgment on Mulugeta's petition for a writ of administrative mandamus no later than August 5, 2002, with opposition briefs due August 19. Reply briefs, if any, will be

filed no later than August 26. No hearing will be held unless the Court determines, after reviewing the briefs, that oral argument is necessary.

C. All of Mulugeta's other state law claims are premature

The Regents move for summary judgment on all of Mulugeta's other state law claims on the ground that he cannot file suit on those claims unless and until he prevails on his petition for a writ of administrative mandamus. The Regents rely largely on the California Supreme Court decisions of Westlake Community Hospital v. Superior Court of Los Angeles County, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976), and Johnson v. City of Loma Linda, 24 Cal. 4th 61, 99 Cal. Rptr. 2d 316 (2000).

In Westlake, the Court held that "whenever a hospital, pursuant to a quasi-judicial proceeding, reaches a decision to deny staff privileges, an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages." Westlake, 17 Cal. 3d at 469, 131 Cal. Rptr. at 91.

> [T]he above requirement accords a proper respect to an association's quasi-judicial procedure, precluding an aggrieved party from circumventing the established avenue of mandamus review. In addition, this result will simplify court procedures by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions. . . .
>
> . . . [O]nce a court determines in a mandamus proceeding that an association's quasi-judicial decision cannot stand, either because of a substantive or procedural defect, the prevailing party is entitled to initiate a tort action against the hospital and its board or committee member or staff.

Id. at 484, 131 Cal. Rptr. at 101-02.

In Johnson, the Court held that Westlake applied to quasi-judicial proceedings conducted by public as well as private entities. Johnson, 24 Cal. 4th at 70 n.2, 99 Cal. Rptr. 2d at 322 n.2. The Court also held that "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." Id. at 70, 99 Cal. Rptr. 2d at 322.

The Court also found that failure to overturn the finding in the quasi-judicial proceeding that the plaintiff's termination was lawful precluded him from bringing a court action under FEHA, but did not preclude him from bring an action under Title VII because of differences in the language of the two statutes. Id. at 65, 99 Cal. Rptr. 2d at 319. "Plaintiff's FEHA claim that his discharge was for discriminatory

reasons is at odds with the preceding determination by the City that his termination was for economic reasons, a finding that, as we have explained is binding." Id. at 71, 99 Cal. Rptr. 2d at 324. In finding that the plaintiff's Title VII claims were not barred, the Court relied on the United States Supreme Court's holding in University of Tennessee v Elliott, in which that Court had held that Title VII claims are not precluded by administrative decisions that have not been judicially reviewed on their merits. Id. at 74, 99 Cal. Rptr. 2d at 326 (citing University of Tennessee v. Elliott, 478 U.S. 788 (1986)).

Similarly, in Edgren v. Regents of the University of California, 158 Cal. App. 3d 515, 205 Cal. Rptr. 6 (1984), the court found that all of plaintiff's claims were barred because he abandoned his quasi-judicial hearing before it was completed. The court held that plaintiff had "failed to complete the administrative hearing as well as the required mandamus review before filing his suit for damages." Id. at 523, 205 Cal. Rptr. at 11.

The law is thus clear that because all of Mulugeta's claims are based on his allegedly unlawful termination, all of those claims, except for his claim under Title VII, are premature because he has not obtained a writ of administrative mandamus overturning the findings at the grievance hearing. Mulugeta argues that nothing in the law precludes him from proceeding simultaneously with a petition for a writ of administrative mandamus and his other state law claims. This argument flies in the face of Westlake and Edgren, which require that the quasi-judicial findings be overturned prior to filing an action for damages. It also flies in the face of common sense. Since the preclusive effect of the quasi-judicial proceedings is undetermined until the writ proceedings are complete, it is impossible to proceed on the state law damage claims simultaneously.

Accordingly, the Court dismisses, as premature, Mulugeta's claims for race and national origin discrimination in violation of FEHA, retaliation in violation of California Government Code § 8547.10; intentional infliction of emotional distress; and wrongful termination in violation of public policy. Mulugeta may refile these claims only if he ultimately prevails on his claim for a writ of administrative mandamus.

D. The Regents have not shown that they are entitled to summary judgment on Mulugeta's claims for race discrimination and national origin discrimination in violation of Title VII

1. Legal standard

Defendants also move for summary judgment on Mulugeta's claims for race and national origin discrimination in violation of Title VII. To establish a prima facie case of racial or national origin discrimination under Title VII, Mulugeta must show that:

1. he belongs to a protected class;
2. that he was qualified for his position;
3. he was discharged; and
4. he was treated differently from a similarly situated employee of a different race or national origin, or he was replaced by a person of a different race or national origin.

See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 2002 WL 1186253 at *2 (9th Cir. June 5, 2002). The requisite degree of proof necessary to establish a prima facie case of discrimination is minimal and need not even rise to the level of a preponderance of the evidence; plaintiff need only offer admissible circumstantial evidence which gives rise to an inference of unlawful discrimination. Villiarimo, 281 F.3d at 1062 (citing Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)); Wallis, 26 F.3d at 889; Aragon at *3. Establishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Once plaintiff has established a prima facie case of racial discrimination, the burden of production, but not persuasion, then shifts to defendants to articulate a legitimate, nondiscriminatory reason for the employee's rejection. McDonnell Douglas, 411 U.S. at 802; Villiarimo, 281 F.3d at 1062. Defendants must produce admissible evidence of the reasons for plaintiff's rejection sufficient to create a genuine issue of fact as to whether they discriminated against plaintiff. Burdine, 450 U.S. at 254-55. Defendants must submit evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for their actions. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993). If defendants do so, the McDonnell Douglas framework, with its presumptions and burdens, disappears

and the sole remaining issue is discrimination vel non. Reeves, 530 U.S. at 142-43.

Plaintiff has the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him. Reeves, 530 U.S. at 143. If defendants articulate a legitimate, non-discriminatory reason for the employee's rejection, plaintiff must show that defendants' proffered reason was a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. Plaintiff can show that the defendant's articulated reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's profferred explanation is unworthy of credence. Villiarimo, 281 F.3d at 1062 (quoting Chuang v. University of California Davis, 225 F.3d 1115, 1123 (9th Cir. 2000)). Merely showing that the defendants' proffered reason is false is not sufficient to compel judgment for plaintiff; plaintiff must prove both that the reason was false, and that discrimination was the real reason for defendants' actions. St. Mary's, 509 U.S. at 515. Evidence that the defendants' reason is false, however, coupled with the evidence used to create a prima facie case of discrimination, may be

sufficient for the trier of fact to conclude that discrimination occurred, however. Reeves, 530 U.S. at 148. In the absence of direct evidence of discrimination, the plaintiff's circumstantial evidence of pretext must be specific and substantial. Villiarimo, 281 F.3d at 1062 (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)). "When evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case based on a McDonnell Douglas type presumption." Wallis, 26 F.3d at 890-91.

However, "[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because 'the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record.'" Chuang v. University of California, Davis, Board of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000) (citing Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996)). "As the Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." Id. at 1127 (citing Reeves, 120 S.Ct. 2097, 2108 (2000)). "While the

plaintiff always retains the burden of persuasion, he does not necessarily have to introduce 'additional, independent evidence of discrimination' at the pretext stage[.]" Id. (citing Reeves at 2106, 2109).

2. Prima facie case

The Regents argue that Mulugeta cannot even establish a prima facie case of discrimination because he cannot show that he was treated differently from other similarly situated employees. Mulugeta contends that he was treated differently than two white male Transportation Department employees, who the Court will refer to as Employee A and Employee B. The Regents contend that Employees A and B were not similarly situated to Mulugeta because they committed dissimilar offenses and were disciplined by different decisionmakers.

The Ninth Circuit has recently cited approvingly the Second Circuit's opinion in McGuinness v. Lincoln Hall, 263 F.3d 49, 53-54 (2d Cir. 2001) as setting forth the minimal showing necessary to establish that co-workers are similarly situated. Aragon, 2002 WL 1186253 at *4. In McGuinness, the Second Circuit explained that:

> A plaintiff is not obligated to show disparate treatment of an identically situated employee. To the contrary, . . . it is sufficient that the employee to whom plaintiff points be similarly situated in all material respects. [citation omitted] In other words, where a plaintiff seeks to establish the minimal prima facie case by making reference to the disparate treatment of other employees, those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination.

Id. at 54. The Second Circuit rejected the trial court's holding that the plaintiff could not be considered to be similarly situated to another employee unless that other employee had the same supervisor, worked under the same standards, and engaged in the same conduct. Id. at 53. Thus, the fact that Employees A and B were disciplined by different decisionmakers does not necessarily preclude them from being similarly situated to Mulugeta.

The grievance files of Employees A and B, as originally submitted by the Regents, did not include the reports about the investigation of Employees A and B, which have been submitted by Mulugeta as Exhibit 13 to the Declaration of Tesfaye Tsadik. The Regents object that Exhibit 13 is unauthenticated. In response, Mulugeta has filed a declaration from James Wood, attesting that he obtained the documents that comprise Exhibit 13 from the Regents under the Freedom of Information Act, and that he gave them to Mulugeta. (Wood Decl. ¶¶ 3-5.) At oral argument, counsel for the Regents also objected that Exhibit 13

did not contain the final report from the audit department, which he handed to the Court. Neither he nor Mulugeta's counsel, after reviewing the document, had any objection to the Court considering the final report in the context of this motion. The Court will refer to the final report as Exhibit G to the Declaration of Julius Katz. As the Court now has the final investigation report, there is no need to rule on the Regents' objections to Exhibit 13.

a. Employee A

Employee A is a white male who was employed as an Assistant Transportation Manager in the Department of Parking and Transportation Services. (Katz Decl. ¶ 2.) On July 5, 1996, Employee A was suspended for ten days without pay due to:

/ /

> serious misconduct in relation to the recent audit performed in Transportation services. This misconduct included entry into a staff member's computer without authorization in order to extract items that were related to the department audit, and your failure to comply with Audit's requirement to keep matters regarding this investigation confidential.

(Katz Decl., Ex. A at UCR1705.) Gledhill and Stella Hsu, Assistant Vice Chancellor for Campus Auxiliary Services, both of whom ultimately report to Barclay, were involved in the decision to discipline Employee A. (Id.; Hsu Decl. ¶ 3.)

In addition to the conduct for which he was expressly disciplined, Employee A's grievance file also shows that he was found to have misused University computers to view sexually explicit Internet sites and to view sexually explicit graphics files. (Katz Decl., Ex G at UC 01958.) He also was found to have misused university resources by instructing University employees to use University vehicles to train non-University individuals. (Id. at UC 01959.) Employee A also admitted that "physicals and license fees for non-University individuals were charged to the University." (Id.) Employee A also made $136 in unauthorized personal telephone calls on University telephones, authorized payment for work that had not yet been performed, recorded 8.5 hours of overtime work that he was not entitled to be paid for at overtime rates, certified 15 employee time records for 67 hours of weekend overtime that could not be verified, and sought payment for three days of work when he was not in the office. (Katz Decl., Ex. G at UC 01960-61.) There is nothing in Employee A's file to indicate the total financial magnitude of his wrongdoing. Nonetheless, the fact that Employee A was not even

disciplined for what appears to be significant misuse of university resources, and was only suspended for ten days for his other misconduct, suffices to establish a prima facie of discrimination against Mulugeta.

b. Employee B

Mulugeta also points to the case of Employee B. Employee B is a white male who was employed as a Vehicle Maintenance Supervisor in the Department of Parking and Transportation Services. (Katz Decl. ¶ 3.) Employee B was suspended for 10 days due to:

> misconduct in relation to findings in the July 1996 audit performed in the Transportation services. This misconduct included misuse of University vehicles, non-compliance with University policy regarding the processing of vendor invoices, and failure to comply with Management and Audit Services' requirement to keep matters regarding this investigation confidential.

(Katz Decl., Ex. B at UCR01729.) Employee B "used the department's University vehicle to conduct personal business on a number of occasions," approved payment of an invoice before work was completed, in violation of university policy, and spoke to several individuals about an audit after being instructed not to do so. (Id.) Employee B was suspended by Gledhill, whose ultimate supervisor is Barclay. (Id.)

In addition to the conduct for which he was expressly disciplined, Employee B also received overpayment of compensation in the amount of $1,999 for leave that should have been without pay, and for inappropriately certified overtime pay. (Katz Decl., Ex. G at UC01951.) He also "consistently recorded time indicating a standard work week and schedule when he worked a modified schedule." (Id.) Employee B also made $852 in unauthorized personal phone calls, and unnecessarily rented a university poolcar, which he then misused to conduct personal business. (Id. at UC01952.)

As Employee B also appears to have engaged in significant misuse of university resources in a monetary amount greater than Mulugeta's misuse of university resources, and received dramatically lighter discipline, the Regents' treatment of Employee B also raises a prima facie case that the Regents discriminated against Mulugeta because of his race or national origin.

The Regents argue that Employees A and B are not similarly situated to Mulugeta because they were disciplined by different decisionmakers, and because they did not engage in the same conduct. It is undisputed, however, that Employees A and B worked with Mulugeta in the same department at the same time, and committed their transgressions in similar time periods. The Court is not convinced that the fortuity

that Mulugeta changed jobs before his misconduct was discovered, and thus was disciplined primarily by decisionmakers not affiliated with the Transportation Department, renders his situation so different from Employees A and B that a jury could not find the three employees to be similarly situated. Also, there is some evidence that Vice Chancellor Barclay, who oversaw the Transportation Department, may have played a role, albeit minor, in Mulugeta's discipline. See Section D.4.c, below.

The Regents' argument that Employees A and B were not disciplined for their misuse of university resources is unavailing. Although their letters of discipline did not mention misuse of university resources, the final investigative report found that Employees A and B did engage in significant misuse of university resources. If Employees A and B received no discipline as a result of those findings, it actually strengthens Mulugeta's argument that there was disparate discipline. The Regents also argued at oral argument that Mulugeta was also found to have engaged in misuse of university resources during the investigation of Employees A and B, and was not disciplined. (Katz Decl., Ex. G at UC 01946.) The report does show that Mulugeta used his university computer for non-university and/or personal use, but that use is not quantified and is only mentioned only in passing in a chart. (Id.) Moreover, there is no finding in that report that Mulugeta engaged in any of the other far more serious misuses that Employees A and B committed. The Regents' argument on this point does not strengthen their case.

Although there are differences between the misconduct engaged in by Employees A and B, and the misconduct for which Mulugeta was terminated, the Court finds that the three employees' misuse of university resources is similar enough that a jury could find them similarly situated. Accordingly, the Regents' lenient treatment of Employees A and B, when compared to its termination of Mulugeta, is sufficient to establish a prime facie case of discrimination.

3. The Regents' nondiscriminatory reasons for terminating Mulugeta

The Regents have set forth nondiscriminatory reasons for terminating Mulugeta. It is undisputed that Mulugeta deposited the university's check to BOMI into his own account without the permission of either BOMI or the Regents, and did not disgorge the money until university personnel asked him what had happened to the check. Agnos, Morales, and Glasscock all felt that termination was appropriate because Mulugeta worked in a department in which he was likely to come into contact with checks and cash

payments. (Grievance Hearing Tr. 183:19-184:17; 277:20-280:22; Glasscock Dep. 118:6-121:22.)

4. Pretext

Mulugeta contends that the Regents' proffered reasons for terminating him were a pretext for discrimination on the basis of his race and/or national origin, primarily on the ground that Employees A and B were not terminated for equivalent or more serious misuses of university resources. While the question is a close one, the Court concludes that the disparity in treatment of Employees A and B is sufficient to raise a triable issue of pretext, in addition to helping establish Mulugeta's prima facie case. A reasonable jury could find that the conduct engaged in by Employees A and B was sufficiently similar to Mulugeta's conduct that the disparity in discipline may have occurred because Mulugeta was of a different race and national origin than Employees A and B. The Regents' more lenient treatment of Employees A and B is sufficient evidence of pretext that the Regents' motion for summary judgment is denied. "As the Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." Chuang, 225 F.3d at 1127 (citing Reeves, 120 S.Ct. at 2108). A reasonable jury could also readily find to the contrary, however, in view of the fact that Morales and Agnos, who participated in the decision to fire Mulugeta, were responsible for hiring him for his new job in the Real Estate Department only a few months earlier, as well as Mulugeta's improper endorsement to himself of the check made out to BOMI, his shifting representations during the investigation about what he did with the check, and his position at the time of his termination, which required handling funds.

a. Employees C, D, E, and F

The Regents point to Employees C, D, E, and F, who, like Mulugeta, also were terminated for misuse of university resources. (See Katz Decl. ¶¶ 4-7 and Exs. C through F.)

Employee C is a white male who was terminated when it was discovered that he had sold six parking permits, for a total amount of $802.60, but kept the funds for himself. (Id. ¶ 4.) Like Mulugeta, Employee C worked in the Department of Parking and Transportation Services at the time of his misconduct. (Id.) Employee C was not terminated until August 2001, however, three years after Mulugeta's termination. (Katz Decl., Ex. C at 1.) Employee C was terminated by Gledhill, with input from

Hsu, both of whom ultimately report to Barclay. (Id.; Hsu Decl. ¶ 5.)

Employee D is a white female who was terminated when she claimed to have lost a paycheck, and then cashed both the original and replacement checks, in the total amount of $2,973. (Katz Decl. ¶ 5.) Employee D was terminated in August 1999, one year after Mulugeta's termination, and six months after he filed his complaint of discrimination. (Id.) Employee D

worked in the Department of Orthopedic Surgery and was terminated by Richard Capra, MSO, Orthopaedic Surgery. (Katz Decl., Ex. D at 1.)

Employee E is a Hispanic male who was terminated for cashing a $28 check that was intended for the university. (Id. ¶ 6.) Employee E was terminated in March 2001 or 2002, approximately two-and-a-half to three-and-a-half years after Mulugeta's termination. (Katz Decl. ¶ 6, and Ex. E at 1.) Employee E was employed in the School of Dentistry Dental Clinics unit, and was terminated by Julian Ponce, Dean for Administration. (Id., Ex. E at 1-3.)

Employee F is a white female who was terminated for altering a $1,205 check made out to the Regents and depositing it in her own account. (Id. ¶ 7.) Employee F was terminated in March 1995, approximately three-and-a-half years before Mulugeta's termination. (Katz Decl. Ex. F at 1.) Employee F worked in the Department of Surgery at the time of her misconduct, and was terminated by Cheryl Gelder-Kogan. (Id.)

Employees D, E, and F did not work in either of the departments in which Mulugeta worked, and there is no evidence that any of the same decisionmakers who terminated Mulugeta were involved in the decision to terminate them in any way. Employees D and E were terminated after Mulugeta raised his complaint of discrimination. "Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer." Lam v. University of Hawaii, 40 F.3d 1551, 1561 n.17 (9th Cir. 1994) (citing Gonzales v. Police Dept. of San Jose, 901 F.2d 758, 761-62 (9th Cir. 1990)) . Their misconduct was very similar to the conduct in which Mulugeta engaged, however, and the discipline each of them received was identical to the discipline that was imposed on Mulugeta. Although a reasonable jury could find that they were similarly situated to Mulugeta, a reasonable jury could also find that the

differences outweigh the similarities.

Because Employee C was terminated years after Mulugeta's termination, a reasonable jury might find that Employee C was not similarly situated to Mulugeta. See Lam, 40 F.3d at 1561 n.17. It is a closer issue, however, since Employee C worked in the same department as Mulugeta, and

Gledhill (and thus Barclay) was involved in his termination. Even though a jury could find that Employee C is similarly situated to Mulugeta, however, the fact that Employee C was also terminated does not eliminate the triable issue created by the Regents' lenient treatment of Employees A and B. Viewed in the light most favorable to Mulugeta, a jury could question the Regents' motive for terminating Employee C, since his termination occurred well after this lawsuit was filed. In other words, a reasonable jury might find that Employee C was terminated in order to make the disparity between the discipline of Mulugeta and the discipline of Employees A and B look less stark. Thus, the discipline of Employee C is, at most, merely additional evidence for the jury to consider in determining whether Mulugeta was terminated because of his race or national origin.

b. Gledhill's racial slurs

Mulugeta also points to a racial slur uttered by Gledhill as direct evidence of racial discrimination. Gledhill was Mulugeta's supervisor in 1996, while the university investigated misuse of university property by other employees in the Transportation department, including Employees A and B. The final audit report contained findings that were critical of Gledhill. (Katz Decl., Ex. G at UC 01944, 01947-48.) LeFore interviewed Mulugeta as part of that investigation, and Gledhill was present during that interview. (Mulugeta Dep. 58:20-59:21.) During that interview, Mulugeta discussed various misdeeds by Employees A and B. (Id. 59:10-62:13.) According to Mulugeta, Gledhill kept interrupting the interview, and appeared red-faced, upset, miserable, and disappointed that Mulugeta was testifying truthfully. (Id. 64:19-69:6.) Sometime afterwards, Gledhill called Mulugeta into a conference room, slammed the door, hit the table, and said to Mulugeta, "You fucking nigger, you don't get nowhere," and then walked out of the room. (Id. 78:1-80:14.) Several years later, when Mulugeta received the invoices from BOMI, Gledhill acknowledged that he was the person who brought them to the attention of the university (Gledhill Dep. 94:19-96:8.) Mulugeta contends that Gledhill instigated his termination.

The fatal flaw in Mulugeta's evidence of Gledhill's appalling racial slur is the lack of relevance to the

Regents' decision to terminate Mulugeta. There is no evidence that Gledhill was one of the decisionmakers who terminated Mulugeta, or that he had any influence over their decision. Instead, the evidence shows that the decision to terminate Mulugeta was made by Agnos in

consultation with Glasscock and Morales. Even if Gledhill's decision to bring the invoices to the attention of the Regents was racially motivated, there is no evidence that the actual decisionmakers based their decision on his motive for bringing the invoices forward for investigation, rather than on the results of that investigation.

c. Failure to follow internal policies

Finally, Mulugeta argues that the Regents' failure to follow their own policies in investigating his misconduct and terminating him shows that their decision to terminate him is also evidence of pretext. As noted above, this argument depends on plaintiff's Exhibit 7, for which plaintiff has laid no foundation. For example, he has not established that Exhibit 7 was the relevant policy at the time of his termination. Accordingly, the Court need not consider this argument. Even if the Court were to consider the argument, the inferences that Mulugeta asks the Court to draw are too strained.

Exhibit 7 is entitled "UCSF Procedures for Investigating Misuse of University Resources" and purportedly "prescribes responsibilities and procedures for investigating known or suspected misuse of resources by University employees, regardless of which University units or employees conduct an investigation and regardless of the type of appointment held by a suspected employee (staff, executive, faculty, student, or other) and for taking corrective action when appropriate." (Ex. 7 at UC01271.) The Vice Chancellor-Administration has overall responsibility for matters concerning known or suspected misuse of University resources. (Id. at UC01272.) Barclay is the Vice Chancellor-Administration. (Plaintiff's Ex. 12.) According to Exhibit 7, the Vice Chancellor-Administration and the Director of Audit & Management Services "will coordinate all reviews and follow-up actions required in alleged misuse cases, which includes identification of losses, prevention of additional losses, application of appropriate personnel procedures, recovery of assets, and assistance with criminal investigation or prosecution." (Ex. 7 at UC01273.)

Employees are to report allegations of misuse to the appropriate department management, who then are required to refer those allegations to the Director of Audit & Management Services. (Id. at

UC01274.) The Director of Audit & Management Services notifies the Assistant Vice Chancellor-Administration about the reports of misuse. (Id.) The Vice Chancellor-Administration is

to be briefed by the Director of Audit & Management Services and the Assistant Vice Chancellor-Administration on all investigations and periodically review their progress. (Id. at UC 01275.) The Director of Audit & Management Services performs all preliminary evaluations and investigations of suspected misuse. (Id. at UC01276). The Assistant Vice Chancellor-Administration and the Director of Audit & Management Services review the results of the preliminary review, coordinate the investigation, evaluate the results of the investigation, and recommend appropriate corrective action. (Id. at UC01277.) They also determine the campus departments that will participate in interviewing knowledgeable employees. (Id. at UC01278.) The Director of Human Resources advises department management on appropriate personnel actions. (Id.) The Assistant Vice Chancellor-Administration and the Director, Audit & Management Services and the Investigation Group develop a Corrective Action Plan ("CAP") which details any recommended measures to be taken, including any disciplinary actions and submits the CAP to the Vice Chancellor-Administration. (Id. at UC 01279.) The Vice Chancellor-Administration approves the CAP, with or without modification, and submits it to the senior administrative officers of the unit or department where the misuse occurred. (Id.)

Mulugeta argues that this procedure was not followed in several ways. First, he argues that the initial investigation was conducted by Obana, who is not part of the Department of Audit and Management Services. Second, he argues that Barclay, the Vice Chancellor-Administration, did not participate in the investigation or termination in the manner set forth in Exhibit 7. Finally, as he points out, it is undisputed that the Assistant Vice Chancellor-Administration, Bill Neff, was not involved at any point in the investigation or in the decision to terminate Mulugeta.

It is undisputed that Barclay asked Obana to do the initial investigation, and that Obana then turned over his initial findings to Kenton LeFore, who was then Associate Director for the Audit Management Services Department. Barclay had no recollection of asking Obana to do any investigation, and thought it would be unusual because he would want the investigation to be done by the auditor. (Barclay Dep. 92:20-93:9.) Nonetheless, it is difficult to see how any jury could find anything nefarious in the fact that some initial factfinding was conducted before LeFore conducted his official investigation.

Barclay does not dispute that he was not personally involved in the investigation of Mulugeta's misuse of university funds. (Barclay Decl. ¶ 8.) He attests that because he is responsible for many departments and over a thousand employees, he has delegated to lower level employees the majority of the responsibilities set forth in the UCSF procedures for investigating misuse of university resources. (Id.) Mulugeta objects that Barclay's declaration contradicts his deposition testimony, but as he fails to direct the Court to any specific contradiction, the objection is overruled.

Mulugeta does not present any evidence that Barclay and Neff were ever involved in any investigation into misuse of university resources. In fact, Glasscock attests that it is the custom and practice of the university that these duties and responsibilities may be delegated to lower level employees. (Glasscock Decl. ¶ 3.) According to Glasscock, this delegation is not improper and does not violate university policy. (Id. ¶ 4.) Thus, there is no evidence that Barclay's and Neff's failure to be involved in Mulugeta's investigation was due to a conspiracy to terminate him because of his race and/or national origin.

Moreover, Mulugeta cannot point to any prejudice that occurred because of these alleged violations of internal university policy. An investigation was done, that evidence was presented to Agnos, Morales, and Glasscock, and they concluded that Mulugeta should be terminated. He has presented no evidence that any of the persons who actually conducted the investigation acted in a racially discriminatory manner, other than the fact that Employees A and B received more lenient discipline. Not is there any evidence that the Regents conducted an inadequate investigation that prejudiced him in any way. Similarly, Mulugeta has no evidence that the three persons who actually decided that he should be terminated (Agnos, Morales, and Glasscock) ever acted in other instances in a racially discriminatory manner. In fact, Morales hired Mulugeta only several months before his termination, at Agnos' recommendation. (Grievance Hearing Tr. 282:25-284:10.) "[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." Bradley v. Harcourt Brace, 104 F.3d 267, 271 (9th Cir. 1996). Moreover, as Agnos and Morales were Mulugeta's supervisors in the Real Estate Department, it was perfectly rational for the Regents to involve them in the investigation and to allow them to decide the appropriate discipline.

Mulugeta's entire argument about the alleged violations of university policy appear to this Court to be a red herring. On the current record, the Court cannot see how any jury would consider these alleged violations of internal policy to be evidence of discrimination.

d. Alleged racial bias by Barclay

Mulugeta testified at deposition that in 1997, before he was terminated, he complained to then-Chancellor Joe Martin that Barclay discriminates against black employees. Michael Adams, the Regents' Director of Affirmative Action also testified at deposition that he received several informal complaints about discrimination by Barclay. (Adams Dep. 22:11-25.) Mulugeta asks the Court to infer that Barclay had a motive to discriminate against Mulugeta, and actually did so.

The evidence of Barclay's involvement in Mulugeta's termination is minimal, however. It is undisputed that he asked Obana to do the initial factfinding, although at the time of Barclay's deposition, he did not recall asking Obana to investigate. (Barclay Dep. 92:20-25.) It is also undisputed that Barclay asked LeFore to do an audit of Mulugeta, although Barclay did not recall it. (Barclay Dep. 97:9-25.) There is no evidence that Barclay participated in the review of LeFore's audit report, or that he participated in the initial decision to terminate Mulugeta. When Mulugeta appealed Agnos' decision to terminate him, Spaulding testified that he was sure he had talked with Barclay about Mulugeta's misconduct, and that Barclay supported Spaulding's position that Mulugeta should be terminated. (Spaulding Dep. 64:10-14.) Spaulding also testified, however, that he made the decision on his own. (Id. 62:8-22.) Barclay testified that Spaulding discussed Mulugeta with him only in very general terms, and did not discuss the appropriate sanction for his misuse of university funds. (Barclay Dep. 98:17-99:10.) Otherwise, there is no evidence that Barclay was involved in the investigation of Mulugeta's misconduct or the decision to terminate his employment.

It is counterintuitive to infer that Mulugeta was terminated because Barclay was retaliating against him for prior complaints of discrimination. If that were the case, it would have made more sense for Barclay to take an active role in the decisionmaking process. On the current evidentiary showing, a reasonable jury could not conclude that Mulugeta's prior complaints about Barclay had anything to do with his termination.

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e. Conclusion

Although Mulugeta's Title VII claims appear to this Court, on this record, to be quite weak, the Court finds that he has presented sufficient evidence to survive summary judgment on his claim for race discrimination and national origin discrimination in violation of Title VII. Although a jury could easily conclude that Mulugeta was terminated solely because of his misuse of university funds, a reasonable jury could also conceivably find that the Regents' far more lenient treatment of Employees A and B, who are white, for similar offenses, showed that Mulugeta was disciplined more severely because of his race and/or national origin. Accordingly, the Regents' motion for summary judgment on Mulugeta's Title VII claims is denied.

CONCLUSION

For the reasons set forth above, and for good cause shown,

1. Both parties' motions for summary judgment on Mulugeta's claim for a writ of administrative mandamus are DENIED.

2. Mulugeta's claims for race and national origin discrimination in violation of FEHA, retaliation in violation of California Government Code § 8547.10; intentional infliction of emotional distress; and wrongful termination in violation of public policy are DISMISSED, without prejudice, as premature. Mulugeta may refile these claims only if he ultimately prevails on his claim for a writ of administrative mandamus.

3. Defendants' motion for summary judgment on Mulugeta's claims for race discrimination and national origin discrimination in violation of Title VII is DENIED.

4. Trial will begin on September 30, 2002 at 8:30 a.m. A pretrial conference will be held on September 10, 2002 at 9:30 a.m.

5. The parties will file simultaneous cross-motions for summary judgment on Mulugeta's petition for a writ of administrative mandamus no later than August 5, 2002, with opposition briefs due August 19. Reply briefs, if any, will be filed no later than August 26. No hearing will be held unless the Court determines, after reviewing the briefs, that oral argument is necessary.

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6. The case is referred for a further settlement conference with Magistrate Judge Wayne Brazil.

IT IS SO ORDERED.

Dated: July 22, 2002

ELIZABETH D. LAPORTE
United States Magistrate Judge

Copies faxed to
counsel of record